Fisher Scientific (M) Sdn Bhd v Progenix Research Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D-28NCC-1009 OF 2010
HAMID SULTAN J
18 APRIL 2011

Companies and Corporations — Winding Up — Petition — Affidavit verifying petition made before petition filed — Whether there was breach of r 26 of the Companies (Winding-Up) Rules 1972 — Whether petition not properly presented for non-compliance with rule — Whether irregularity could be condoned — Affidavit opposing petition in breach of r 30(1) of the Rules — Effect of — Whether compliance was mandatory — Whether objections had merits — Whether petition should be granted — Companies Act 1965 s 355 — Companies (Winding-Up) Rules 1972 rr 26, 30(1) & 194(1)

The petitioner petitioned to wind up the respondent company for an unpaid debt. The respondent objected to the petition by disputing the debt. The respondent further claimed that it was not insolvent, and that the s 218 notice had not been properly served by the petitioner on the respondent. The petitioner raised the issue that the respondent's affidavit opposing the petition was filed in breach of r 30(1) of the Companies (Winding-Up) Rules 1972 ('the Rules'). At the hearing of the Winding-Up petition the respondent raised the preliminary objection that the affidavit verifying the petition, which was made before the Winding-Up petition was filed, was in breach of r 26 of the Rules.

Held, allowing the petition:

(1) The respondent's affidavit opposing the petition was filed in breach of r 30(1) of the Rules, which required the affidavit in opposition to a Winding-Up petition to be filed and served on the petitioner seven days before the date of hearing of the petition. It is settled law that r 30(1) of the Rules is mandatory in nature and should be strictly complied with by the respondent if it intended to oppose the petition. In any case, even on merit the defendant's objections had no merits taking into consideration the contemporaneous documents and the law in respect of the said objections (see paras 7(a) & (b)).

(2) The many cases cited by the petitioner supported the proposition that an affidavit verifying the petition made before the petition was filed did not make the petition sterile. As such, the court found the affidavit verifying the petition in the present case to be regular. In any case, even if there was any irregularity as submitted by the respondent, s 355 of the Companies Act 1965 as well as r 194(1) of the Rules gave sufficient power to the court

to condone such irregularity, provided it could be demonstrated that the respondent suffered no prejudice and/or injustice (see paras 7(c) & (d)).

[Bahasa Malaysia summary

Pempetisyen mempetisyen untuk menggulung syarikat responden untuk hutang yang tidak dibayar. Responden membantah terhadap petisyen tersebut dengan mempertikaikan hutang tersebut. Responden selanjutnya mendakwa bahawa ia tidak mampu bayar, dan bahawa notis s 218 tidak diserahkan secara betul oleh pempetisyen ke atas responden. Pempetisyen membangkitkan isu bahawa afidavit responden membantah petisyen tersebut difailkan dalam kemungkiran terhadap k 30(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah'). Semasa pendengaran petisyen penggulungan tersebut responden membangkitkan bantahan awalan bahawa afidavit yang mengesahkan petisyen, yang dibuat sebelum petisyen penggulungan difailkan, adalah memungkiri k 26 Kaedah-Kaedah.

Diputuskan, membenarkan petisyen:

(1) Afidavit responden yang membantah petisyen tersebut difailkan dalam kemungkiran terhadap k 30(1) Kaedah-Kaedah, yang mana memerlukan afidavit membantah kepada petisyen penggulungan difailkan dan diserahkan ke atas pempetisyen tujuh hari sebelum tarikh pendengaran petisyen tersebut. Ia adalah undang-undang yang nyata bahawa k 30(1) Kaedah-Kaedah adalah bersifat mandatori dan patut dipatuhi secara betul oleh responden jika ia berniat untuk membantah petisyen tersebut. Walau bagaimanapun, walaupun atas merit bantahan defendan tidak mempunyai merit mengambilkira dokumen-dokumen semasa dan undang-undang berkaitan pembantahan tersebut (lihat perenggan 7(a) & (b)).

(2) Kes-kes yang dirujuk oleh pempetisyen menyokong cadangan bahawa afidavit yang mengesahkan petisyen yang dibuat sebelum petisyen difailkan tidak membuatkan petisyen tersebut tidak produktif. Oleh itu, mahkamah mendapati afidavit yang mengesahkan petisyen dalam kes ini adalah biasa. Walau bagaimanapun, walaupun terdapat ketaksekataan seperti yang dihujahkan oleh responden, s 355 Akta Syarikat 1965 dan juga k 194(1) Kaedah-Kaedah memberi kuasa mencukupi kepada mahkamah untuk membiarkan ketaksekataan sedemikian, jika ia dapat didemonstrasikan bahawa responden tidak mengalami prejudis dan/atau ketidakadilan (lihat perenggan 7(c) & (d)).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1508–1666.

Cases referred to

BP Lim Sdn Bhd v Sijori Holdings Sdn Bhd (MT-5) 28–149 of 2009 (refd)

Chin Yoon Timber Co v Overseas Lumber Bhd [1978] 2 MLJ 173 (refd)

Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd [1997] 2 MLJ 756; [1997] 3 CLJ 485, CA (refd)

Dato' Ting Check Sii v Datuk Hj Mohammad Tufail Mahmud & Anor [2007] 7 MLJ 618; [2008] 7 CLJ 453, HC (refd)

Daya Anika Sdn Bhd v Kuan Ah Hock [1998] 6 MLJ 537, HC (refd)

Delta Drive (M) Sdn Bhd v Hong Leong Finance Bhd [2008] 4 MLJ 400; [2007] 4 CLJ 435, CA (folld)

Genting Sanyen Industrial Paper Sdn Bhd v WWL Corrugators Sdn Bhd [2000] 5 MLJ 33, HC (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34, CA (refd)

Hong Leong Finance Bhd v Delta Drive (M) Sdn Bhd [1999] 6 MLJ 239, HC (refd)

Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd [1990] 1 MLJ 21, HC (refd)

Malayan Banking Bhd v Red Box (Malaysia) Bhd [2000] MLJU 108, HC (refd)

Medallion Builders Sdn Bhd v Sinarlim Sdn Bhd (D-22NCC-695 of 2010) (refd)

Mohd Shatif bin Sapie, Re exp Malayan Banking Bhd [1992J 2 MLJ 102, HC (folld)

Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd [1998] 3 MLJ 810, HC (refd)

Sari Atlantic Sdn Bhd v Aik Kim Enterprise [1988] 1 MLJ 201 (folld)

Sunshine Securites (PTE) Ltd & Anor, Re v Official Receiver and Liquidator of Mosbert Acceptance Ltd [1978] 1 MLJ 57, CA (refd)

Unispan Formwork Sdn Bhd v Kim Choy Tractor Work Sdn Bhd [2004] MLJU 160; [2004] 4 CLJ 151, HC (refd)

Woodsville Sdn Bhd v Tien Ik Enterprise Sdn Bhhd & 4 Ors (D-28–187 of 1990) (refd)

YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd) [1996] 2 MLJ 482, CA (refd)

Legislation referred to

Companies Act 1965 ss 218, 355

Companies (Winding-Up) Rules 1972 rr 26, 30(1), 194(1)

Cherian Kumar (Feroz & Co) for the petitioner.

Goh Meng Yew (Iza Ng Yeoh & Kit) for the respondent.

Hamid Sultan J:

[1] This is my judgment in respect of the petitioner's petition (encl 1) to wind up the respondent.

[2] The central issue in the instant case is whether an affidavit verifying petition purportedly made before the petition was filed, warrants the court to dismiss the petition.

BRIEF FACTS

[3] The petitioner's claim is not based on judgment but the liability of the respondent is well documented in the exhibit marked as 'FSSB2'. In addition the respondent: (i) had not filed affidavit in opposition within the time frame limited by the Winding-Up rules; (ii) the petition was adjourned several times pending settlement which did not materialise.

[4] The respondent objects to the petition on several grounds namely (i) the affidavit verifying the petition was in breach of the rules; (ii) s 218 notice was not served on the respondent's registered address; (iii) the debt is disputed; (iv) the respondent is not insolvent.

[5] The petitioner says that since the affidavit in opposition was in breach of rules the issues raised by the respondent cannot be entertained at law based on the Court of Appeal decision in the following cases namely:

(a) In *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 3 CLJ 485 the court made the following observations:

> The service of all the affidavits on the bank had clearly and blatantly contravened the mandatory time requirement prescribed by r 30(1) of the Rules and, therefore, the trial judge was right in refusing to admit them. Consequently, as the affidavits were inadmissible, there was no evidence of the company's cross-claim which warranted the notice to be heard on its merits.

(b) In *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34 the Court of Appeal had this to say:

> the clear and unambiguous words employed in r 30(1) of the Companies (Winding-Up) Rules 1972 must be given effect and, accordingly, the impugned affidavit cannot be relied upon in opposing the petition to wind-up the respondent.

[6] The parties have relied on the following cases: *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 2 MLJ 756; [1997] 3 CLJ 485; *Unispan Formwork Sdn Bhd v Kim Choy Tractor Works Sdn Bhd* [2004] MLJU 160; [2004] 4 CLJ 151; *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482; *Daya Anika Sdn Bhd v Kuan Ah Hock* [1998] 6 MLJ 537; *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21; *Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd* [1998] 3 MLJ 810; *Malayan Banking Bhd v Red Box (Malaysia) Bhd* [2000] MLJU 108; *Re Sunshine Securites (PTE) Ltd & Anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57; *Genting Sanyen Industrial Paper Sdn Bhd v WWL Corrugators Sdn Bhd* [2000] 5 MLJ 33; *Hong Leong Finance Bhd v Delta Drive (M) Sdn Bhd* [1999] 6 MLJ 239; *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173; *Delta Drive (M) Sdn Bhd v Hong Leong Finance Bhd* [2008] 4 MLJ 400; [2007] 4 CLJ 435; *BP Lim Sdn Bhd v Sijori Holdings Sdn Bhd* (MT-5)28–149 of 2009; *Medallion Builders Sdn Bhd v Sinarlim Sdn Bhd* (D-22NCC-695 of 2010); *Woodsville Sdn Bhd v Tien Ik Enterprise Sdn Bhd & 4 Ors* (D-28–187 of 1990).

[7] I have read the petition, affidavits and submissions of the parties in details. I take the view the petition must be allowed. My reasons, inter alia, are as follows:

(a) I am satisfied that the respondent's affidavit in opposition was filed in breach of r 30(1) of the Winding-Up Rules. The Court of Appeal had repeatedly stated that the said rule is mandatory in nature and ought not be breached if the respondent intends to oppose the petition. I have dealt with this area of jurisprudence in the case of *Dato' Ting Check Sii v Datuk Hj Mohammad Tufail Mahmud & Anor* [2007] 7 MLJ 618; [2008] 7 CLJ 453 where I have made the following observations:

> On 7 May 2007 when the petition was called for hearing, the petitioner objected to the last affidavit of the respondent on the grounds that the affidavit was filed out of time. The petitioner relied on the Court of Appeal decision of *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 3 CLJ 485 to expunge the said affidavit. I heard the submission of the parties and expunged the said affidavit and said that I will state my reasons after hearing the petition. They are as follows:
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> (a) In Bank of *Commerce (M) Berhad v Far East United Industries Sdn Bhd* [2000] 1 LNS 88, the provision of r 30(1) of the Companies (Winding-Up) Rules 1972 was considered. KN Segara J (as he then was) following the Court of Appeal decision in *Crocuses* held that r 30(1) of the Companies (Winding-Up) Rules 1972 specifically provides that affidavit-in-opposition to a Winding-Up petition must be filed and a copy thereof served on the petitioner or his solicitors at least seven days

before the appointed date of hearing of the petition. Further, the court stated that the said rule is mandatory in nature and should be strictly complied with.

(b) must be asserted that the Winding-Up rules were made pursuant to s 372 of the CA 1965 and s 16 of the Courts of Judicature Act 1964 (CJA 1964). A point to be noted is that the High Court has unfettered powers pursuant to s 25(2) of the CJA 1964 as set out in the schedule under the title 'Additional Powers of High Court'. Under cl 8 of the 'Additional Powers of the High Court' it is stated that power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, lies with the court. Therefore, any application must not be made until after the expiration of the time prescribed, provided that this provision shall be without prejudice to any written law relating to limitation. That being the case, to say r 30 of the Winding-Up rules is mandatory will be in breach of cl 8 of the additional powers of the High Court to be read with s 355 of the CA 1965 and r 193 of the Winding-Up rules. The observation of the Court of Appeal in *Crocuses* case in respect of r 30 of Winding-Up rules will appear to be per incuriam. It would have been appropriate if the Court of Appeal had considered the decision of the *Privy Council in Toy Bok Choon v Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 where the provision of the Winding-Up rules was considered and the court specifically stated:

> In Winding-Up proceeding the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that the application has been granted and the deponent does not attend.

(c) Though *Crocuses* case appears to be per incuriam, I take the view that in not allowing the further affidavit in reply, the respondents will not prejudice the respondents' case for the burden of proof is upon the petitioner and not the respondents to make out a case for Winding-Up. The petitioner is not entitled in law to broaden his case more than what was stated in his petition and the respondent's affidavit in opposition should sufficiently rebut the petitioner's allegation in the petition. Support for this proposition can be garnered from a number of cases.

(b) Even on merit, the defendant's objection as to (a) s 218 notice; (b) the debt is disputed; (c) the respondent is not insolvent has no merits taking into consideration the contemporaneous documents and the law in respect of the said objections.

(c) On the issue that the petition is not properly presented before the court — which may stand as preliminary objection for non-compliance of r 26 of the Companies Winding-Up Rules 1972 which states:

> Every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in

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> case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be prima facie evidence of the statements in the petition.

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The respondent had relied on the following cases to drive home this point. The cases are namely:

(i) *Hong Leong Finance Bhd v Delta Drive (M) Sdn Bhd* [1996] 6 MLJ 239 the High Court had this to say:

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> Based on the earlier finding that because of the wording of para 2 of the Form 7 is standard, the affidavit verifying petition could only be sworn after the petition. No evidence to the contrary was brought to the attention of this court. It would appear that because of the wordings of r 26, the petition and the affidavit verifying petition cannot be filed contemporaneously. The affidavit shall be sworn after and filed within four days after the petition is presented.

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(ii) *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 where the High Court had held:

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> The principle governing an affidavit is that it must be made in some cause or mater which is actually pending in the court.

In the instant case I am satisfied that the affidavit verifying the petition is regular. Even if there is any such irregularity as advocated by the
F respondent the Companies Act 1965 as well as the rules gives sufficient power to the court to condone the irregularity provided an application is made to the court and it can be demonstrated that the respondent will suffer no prejudice and/or injustice. The said Act and rules in respect of non-compliance reads as follows:

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Section 355 of the Companies Act 1965:

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot
H be remedied by any order of the Court.

(2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

Rule 194(1) of the Companies (Winding-Up) Rules 1972:

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> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the Court.

(d) Support for the proposition that an affidavit verifying the petition before the petition was filed does not make the petition sterile, is found in a number of cases and approved by Court of Appeal in *Delta Drive (M) Sdn Bhd v Hong Leong Finance Bhd* [2007] 4 CLJ 435, *Re Mohd Shatif bin Sapie, exp Malayan Banking Bhd* [1992] 2 MLJ 102 and *Sari Atlantic Sdn Bhd v Aik Kim Enterprise* [1988] 1 MLJ 201.

[8] The court is quite disappointed to note that learned counsel for the respondent had not taken the trouble to apprise the court of the above decisions of the Court of Appeal as well as the High Court which does not support the respondent's contention. The failure to do so had taken much judicial time to craft this judgment, to address the circuitous arguments raised in opposition to the petition.

[9] For reasons state above the petition encl 1, prayers 1, 2 and 3 are allowed.

[10] I hereby order so.

Petition allowed.

Reported by Kohila Nesan